

**Self Regulation in the Infomercial Industry:
Moving Forward**

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Electronic Retailers Self-regulatory Program

I. Introduction

Good morning. I am delighted to join you today. I want to thank the Electronic Retailer's Association (ERA) and the Electronic Retailing Self-Regulation Program (ERSP) for inviting me.

ERSP, of course, was launched in August 2004 for the purpose of reducing the dissemination of false and unsubstantiated advertising claims in infomercials and other electronic direct response marketing.

A year ago, in a speech to the Council of Better Business Bureaus, I noted that, "We are hopeful that the ERSP can improve the industry's record by providing a vehicle to promptly address deceptive infomercial claims and by serving as a tangible sign of a greater industry commitment to truthful advertising."² In the last year and a half, substantial progress has been made towards an effective self-regulatory regime for electronic direct-response marketing. I am encouraged to hear that a number of leading cable companies have played an important role in the success of this program. As with most self-regulatory programs, however, there is room for improvement. Specifically, although I understand that some cable companies are utilizing ERSP decisions in deciding whether to run ads, others apparently are not. Given the history of the

¹ The views I express here are my own, and are not necessarily those of the Federal Trade Commission ("FTC" or "Commission") or any other individual Commissioner.

² See FTC Chairman Deborah Platt Majoras, Self Regulatory Organizations and the FTC, Address Before the Counsel of Better Business Bureaus, April 11, 2005, *available at* <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>.

infomercial industry and the creativity and the commitment demonstrated by the ERA's self-regulatory efforts, this is, at best, a squandered opportunity – and at worst, a conscious decision to disregard the interest of your audience.

II. The Benefits of Self-regulation

At the FTC we have long believed that well-constructed industry self-regulatory programs offer several advantages for consumers, regulators, and the industry. First, self-regulation can be more prompt, flexible, and responsive than traditional statutes and regulations. An investigation sufficient to support an FTC advertising case requires substantial government and company resources and can take many months to complete. By contrast, the average time for an ERSP review is less than 60 days. This provides real benefits for consumers, because the more quickly a deceptive advertisement is identified and corrective action taken, the smaller the consumer injury.

Second, the self-regulatory process and outcomes will likely be flexibly adapted to the realities of the market. Under these circumstances, the programs can be conceived with the accumulated judgment and hands-on experience of the industry members involved, resulting in workable rules that are at once more effective and less burdensome for firms. And often the rules or guidelines developed will represent a broad cross-section of industry views, because participants will not want to risk significant refusals to participate, which would undermine the entire scheme.

Third, compliance can be just as high, or higher, under a coordinated self-regulatory system as under government regulation, because the member firms participate in the construction of the system and will have “bought into” the regulatory process. Self-regulatory dispute

resolution might also be less adversarial and more efficient than more formal legal or regulatory procedures for disputes both between member firms and between consumers and firms. And if the process is sufficiently objective and transparent, it permits the public to judge the integrity of the review system and increases confidence in self-regulation.

Finally, there are real financial incentives to ensure the success of industry self-regulation. A reputation for unchecked deception serves no one's interest: not the honest advertiser's, the media's, or the public's. Action taken through self-regulation can respond directly to concerns about deception without the expense, the high levels of publicity, or the coercive remedies that often characterize government enforcement actions.

In short, meaningful self-regulation provides an important complement to the Commission's law enforcement actions against deceptive marketing. Together, we can lower the amount of deception in the market place, promote greater consumer confidence, and save scarce enforcement resources. For these reasons, it should be no surprise that the FTC has long been a strong supporter of well-constructed, effective self-regulatory programs.³

³ The Commission has expressed support for effective advertising industry self regulation consistently for the last thirty years. Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Self-Regulatory Organizations and the FTC, Address Before the Council of Better Business Bureaus (Apr. 11, 2005), *available at* <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>; Timothy J. Muris, Chairman, Fed. Trade Comm'n, Do the Right Thing (Apologies to Spike Lee), Remarks Before the Cable Television Advertising Bureau, (Feb. 11, 2003), *available at* <http://www.ftc.gov/speeches/muris/030211rightthing.htm>; Robert Pitofsky, Chairman, Fed. Trade Comm'n, Self-Regulation and Antitrust, Prepared Remarks at the D.C. Bar Association Symposium (Feb. 18, 1998), *available at* <http://www.ftc.gov/speeches/pitofsky/self4.htm>; Roscoe B. Starek III, Comm'r, Fed. Trade Comm'n, National Advertising: Issues and Priorities at the FTC, Prepared Remarks Before the National Advertising Review Board (Dec. 8, 1993) (transcript available in the Federal Trade Commission Library); Janet D. Steiger, Chairman, Fed. Trade Comm'n, Address at the National Advertising Review Board 1992 Annual Meeting (Dec. 9, 1992) (transcript available in the Federal Trade Commission Library); Deborah K. Owen,

III. FTC Enforcement

There is no question, however, that self-regulatory programs work most effectively when the stakeholders have strong incentives to comply, and one of the best incentives is law enforcement. In that regard, the FTC remains quite active.

Since last April, the Commission has filed ten complaints against companies making allegedly unsubstantiated or false advertising claims through various forms of electronic direct-response marketing, including infomercials, short spot cable and television advertisements, radio ads, and the Internet. During the same time period, the Commission obtained orders against 26 companies and 27 individuals, some of those arising from cases filed prior to this year. In addition to broad injunctive relief, these orders required defendants to pay a total of \$29 million in consumer redress, disgorgement, and civil penalties.

In February 2006, for example, the Commission filed a complaint in federal district court in Ohio against Berkeley Premium Nutraceuticals, Steve Warshak and others, challenging their marketing of dietary supplements. The advertisements, which ran on television – including many cable networks – as well as on radio, the Internet, and in print, offered “free” product samples. The FTC charged that after consumers provided credit or debit card information to pay

Comm’r, Fed. Trade Comm’n, *The Challenge of Advertising Regulation*, Remarks Before the National Advertising Review Board (Dec. 7, 1990) (transcript available in the Federal Trade Commission Library); Daniel Oliver, Chairman, Fed. Trade Comm’n, *The Coming of Age in Advertising Regulation*, Address Before the Council of Better Business Bureaus (Sept. 22, 1986) (transcript available in the Federal Trade Commission Library); James C. Miller III, Chairman, Fed. Trade Comm’n, *Maximizing the Benefits of Self-Regulation*, Address Before the White House Conference on Association Self-Regulation (Oct. 3, 1984) (transcript available in the Federal Trade Commission Library); Michael Pertschuk, Chairman, Fed. Trade Comm’n, *Advertising and Inflation*, Speech Before the Annual Meeting of National Advertising Review Board (Nov. 8, 1978) (transcript available in the Federal Trade Commission Library).

the \$4.50 shipping and handling fee for the “free” samples, the defendants used that information to bill the consumers for future shipments they sent automatically. According to the Commission’s complaint, the defendants did not obtain consumers’ authorization for recurring debits and made cancelling the shipments quite difficult. In addition, the Commission challenged claims that a supplement called Avlimil could treat female sexual dysfunction and that a supplement called Rogisen could improve night vision problems. This litigation is currently ongoing.

Similarly, in 2004, the FTC filed an action in federal district court in California against Window Rock Enterprises, Inc., Infinity Advertising, Inc., their principals and a business partner.⁴ These defendants sold two dietary supplements – “CortiSlim” and “CortiStress” – through widely aired infomercials and short TV commercials, as well as through other media. For the CortiSlim product, the FTC’s complaint alleges that the defendants falsely and without substantiation claimed that the product causes substantial and permanent weight loss, and that the effectiveness of CortiSlim was scientifically proven. For CortiStress, the Commission’s complaint challenges allegedly false and unsubstantiated claims that the product reduces the risk of, or prevents, serious health conditions such as osteoporosis, obesity, diabetes, Alzheimer’s disease, cancer, and cardiovascular disease. The Commission’s complaint also charges that the format used in the infomercials was deceptive. This litigation is on-going as to most defendants, but during the pendency of the lawsuit, these defendants have agreed to an interim stipulated order prohibiting them from making the claims challenged in the FTC’s complaint. Three

⁴ *FTC v. Window Rock Enterprises also d/b/a Window Rock Laboratories, also d/b/a CortiSlim et al.*, Civ. No. CV04-8190-DSF (JTL) (C.D. Cal. 2004). Three additional defendants were later added to the lawsuit.

defendants have settled the FTC charges, giving up \$4.5 million in cash and other assets, and agreeing to strong injunctive prohibitions.

IV. ERSP

In many quarters, including late night TV and the press, infomercials have become synonymous with deception. Two weeks ago, for example, the *New York Times* carried a story about infomercials with the headline, “A Couple of Words to Live By in the Infomercial World: Caveat Emptor.”⁵ Roughly translated, that means “you just can’t trust ’em.” The article notes that, “The biggest problem remains that people are suspicious of infomercials,” and quotes an infomercial producer as saying “Every time there is a bogus product out there, and it happens every year, a lot of us in the industry cringe. Buyer beware every time you see an infomercial.”

Whether or not this perception is warranted, it is real. It may be the result of the misconduct of a few in an industry where the vast majority are entirely honest; but that does not change the perception. Only action can build credibility, and that is where ERSP plays an important role.

Since August 2004, ERSP has reviewed 78 cases and has been able to obtain a respectable degree of industry compliance. In 55 cases, participants have agreed to modify their advertisements based on ERSP’s recommendations, for an overall compliance rate of 70%. Given the wide range of companies involved in electronic direct-response marketing, ERSP should be proud of this early record.

⁵ Damon Darlin, *A Couple of Words to Live By in the Infomercial World: Caveat Emptor*, N.Y. Times, April 8, 2006, at B1.

Unfortunately, some companies refuse to participate in ERSP proceedings, and others will not comply with ERSP decisions. It is understood that some cases will be referred to the FTC. The FTC takes these referrals very seriously. Each case referred to the FTC is reviewed carefully on the merits. Although Commission rules do not allow me to comment on non-public matters, I can tell you that of the nine matters that ERSP referred to the FTC, three of the companies are currently under order, and two more companies are directly or indirectly involved in ongoing FTC litigation.

Indeed, two of these referrals involved Great American Products and Physician's Choice. In May 2005, the Commission filed a complaint and stipulated final order in federal district court in Florida against these two companies, and two individual defendants.⁶ The products were advertised via infomercials and short spot radio and television ads. In that case, the Commission challenged claims that two dietary supplements, Ultimate HGH and Super HGH Booster, and two sublingual sprays, Master HGH and Super HGH, would provide various anti-aging benefits including weight loss, reduction in blood pressure and cholesterol, and increase cognitive function, immune function, and sexual performance. The order settling the charges of deceptive marketing required the payment of up to \$20 million in consumer redress – the largest judgment yet obtained in an FTC health fraud case. Additionally, the order provided strong injunctive relief, prohibiting the challenged claims and prohibiting the defendants from misrepresenting the benefits of other foods, drugs, or dietary supplements.

V. The important role of cable companies

⁶ *FTC v. Great American Products, Inc. et al.*, Civil Action No. 3:05CV170-RV-MD (N.D. Fla. May 20, 2005) (stipulated final order).

Unlike many self-regulatory programs, the ERSP program not only depends on voluntary cooperation from direct-response marketers, it also depends on firms that provide services to those marketers. Indeed, the cooperation of broadcasters and the cable television industry is particularly critical to the success of the ERSP program. ERSP's advertising review is not limited to ERA members. For non-ERA members, the threat of immediate loss of revenue that will occur if media outlets refuse to disseminate non-compliant advertisements may be even more effective than the threat of referral to the FTC in obtaining compliance with ERSP decisions.

When the ERSP program was initiated in August of 2004, then-FTC Chairman Timothy Muris requested that the National Cable & Telecommunications Association encourage its members to consider NARC's findings when deciding whether to run an ad.⁷ Some companies, including Discovery, MTV, Lifetime, and ABC, have stepped forward to do the right thing. Others have not. For those who have hesitated, we ask you to reconsider for several reasons. First, you owe it to your audience. They are your most valuable asset, and you should not abandon them to deceptive advertising because they may abandon you. Second you owe it to yourself. You sell advertising space, and you do not want to devalue its credibility. Reputable advertisers do not want their advertising to run after an obviously false weight loss ad. It devalues both. And third, think about your bottom line. If a company is deceiving its customers, what assurance do you have that you will actually get paid? And along those lines, keep in mind that when the FTC takes action, we will try to ensure that all available assets go to pay back

⁷ Letter from Timothy J. Muris, Chairman, Federal Trade Commission, to Rober Sachs, President and CEO, National Cable & Telecommunications Association, dated August 12, 2004.

consumers, not to pay past due advertising accounts. But in case you need an additional push, going forward, I have told FTC staff that in appropriate situations, FTC press releases should expressly mention the cable companies that continue to run ads after an ERSP action finds that an advertisement is deceptive and a manufacturer refuses to make appropriate modifications to the ad.

We take as a given that no company wants to air false advertising. Indeed, many of the cable and television network standards explicitly provide that the broadcaster may refuse advertising containing false or unsubstantiated claims. If your organization does not have standards, then it is truly out-of-step with the best practices in the industry.

Assuming that your organization has clearance standards, what are some practical ways to implement those standards? First, clearance standards are not self-executing. Someone within your organization must be responsible for reviewing advertising to determine whether the advertising complies with your clearance standards, and, for obvious reasons, that person should be independent from the marketing department that is selling ad space. In addition, it is important that the clearance department be provided with the requisite authority and organizational support to carry out its function.

Once this infrastructure has been provided, there are some important resources that are available to your ad reviewers to make their task easier. These include NAD decisions, ERSP decisions, and the Commission's Red Flag guidance on bogus weight-loss claims. By utilizing these tools in deciding whether to run an ad, the basics can be covered, without the necessity of conducting an in-depth investigation of every advertisement your company disseminates.

Designing and implementing ERSP was not an easy task. It required creativity,

commitment, and persistence. But it does appear to be working, thanks in no small part to the participation of the subset of cable companies that refuse to participate in defrauding consumers.

VI. The special problem of weight-loss product advertising and the Red Flags initiative.

The Red Flag Initiative provides a good example of how media can step up and take some responsibility for what your viewers see. As I am sure you know, weight-loss advertising has been one of the most problematic areas within direct response marketing.

In 2001, FTC staff conducted a non-scientific survey that indicated that the number of advertisements for weight loss products containing facially false claims had actually increased, despite a decade of law enforcement. Indeed, in 2001, we found that almost half the ads for weight loss products included at least one claim that was facially false.⁸ To combat this problem, we decided to enlist the media as an ally in our campaign. In 2003, we published a guide that describes seven claims in weight loss ads that should raise red flags because they are always false.⁹ For example, any claim that you can lose weight without diet or exercise is false. Then-Chairman Muris and Commissioner Leary met with members of the media and asked that they “do the right thing” and refuse to run advertisements that make the “Red Flag” claims.¹⁰

While many protested at the time, it certainly appears that many – not all – are doing the right thing. In April 2005, we issued a report based on data gathered in 2004, which appear to

⁸ FTC, *Red Flag, Bogus Weight Loss Claims*, (2003), available at <http://www.ftc.gov/bcp/online/edcams/redflag/falseclaims.html>.

⁹ FTC, *Deception in Weight-Loss Advertising Workshop: Seizing Opportunities and Building Partnerships to Stop Weight-Loss Fraud*, (2003), available at <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>.

¹⁰ FTC Chairman Timothy J. Muris, *Do the Right Thing*, Remarks Before the Cable Television Advertising Bureau (Feb. 11, 2003), available at <http://www.ftc.gov/speeches/muris/030211rightthing.htm>.

show that the media have responded to our challenge.¹¹ We repeated our survey of weight loss advertisements and, a year after first asking the media for help, we found that the number of ads with Red Flag claims had fallen from almost 50 to 15 percent. Fifteen percent is still too high, but the progress is remarkable. For some of the worst claims – like the promise of substantial weight loss without diet or exercise – the results are even better, down from a whopping 43 percent to 5 percent of weight-loss product ads.

I commend those members of the media that have made conscientious efforts to screen out these blatantly deceptive ads. But I also emphasize that continued effort is necessary. Although there has been substantial progress, we have seen indications of backsliding. For example, we recently have seen advertisements in *Cosmopolitan* and *Valassis* FSIs with headlines like “How I lost 41 pounds in less than 2 months without dieting,” “New Calorie-Busting Slimming Pill Forces You to Lose Weight Without Diet or Exercise.” You don’t have to be a scientist to question the truth of these claims.

As an incentive to combat backsliding, we are planning to identify those media companies that disseminate allegedly false ads. We will include the names of these companies in our press releases announcing an FTC action challenging those claims. In addition, companies that disseminate “Red Flag” claims may receive a formal letter from the FTC reminding them of the Red Flags campaign and telling them of the need to take steps to stop such backsliding.

We remain committed to promoting effective media screening. We have no intention of

¹¹ FTC Staff, 2004 *Weight-Loss Advertising Survey* (2005), available at <http://www.ftc.gov/os/2005/04/050411weightlosssurvey04.pdf>.

just declaring victory and going home. We will continue to monitor major media sources for Red Flag claims and take the appropriate action where necessary.

VII. Additional Issues – Buzz Marketing and Childhood Obesity

Two additional issues on which the FTC is working likely are of interest to your industry, and I will touch on them briefly.

A. Buzz Marketing

In addition to our review of traditional advertising, we also are monitoring the evolution of new marketing techniques, such as “word of mouth” or “buzz” marketing. Buzz marketing may involve marketers paying consumers to promote their products in public or to their friends. One example might be a digital camera manufacturer paying an individual to stop people on the street and ask them to take a picture. The “buzz marketer” may then say how much she loves the camera and point out an interesting feature. The FTC has received a complaint from a consumer organization, Commercial Alert, urging the FTC to take action against buzz marketers that do not disclose that they are being paid to discuss the product or the identity of the marketer paying them.

A new trade association, the Word of Mouth Marketing Association, has issued draft ethical conduct guidelines to make sure that buzz marketers are upfront about who they are and what they are doing. In addition, as it does in all new forms of marketing, the FTC will closely monitor developments in this area to ensure that marketers follow well-settled truthful advertising principles.

B. Childhood Obesity

Finally, I would like to conclude by returning to the issue of weight loss and discussing

one of the challenging health issues facing our nation: the rapidly growing rate of obesity in adults and children. The latest data from the U.S. National Center for Health Statistics estimate that more than 60 million adults in the United States are obese, and the numbers for children are even more sobering – 9 million young people between ages 6 and 19, with the percentage of overweight children tripling since 1980.¹² This troubling development has led some to point the finger at food companies that advertise to children.

Last July, the Federal Trade Commission and the Department of Health and Human Services held a public workshop on “Marketing, Self-Regulation, and Childhood Obesity.” Through this Workshop, we provided a forum for sharing perspectives from all stakeholders on the marketing of food and beverages to children, on industry self-regulatory efforts, and on recent initiatives by individual companies to respond to childhood obesity through changes in their products or their marketing methods. One panel of the Workshop focused solely on the role that the media and entertainment industry can play in engaging children and motivating them. As the Institute of Medicine recognized last year in its report on preventing childhood obesity, “there is great potential for the media and entertainment industries to encourage a balanced diet, healthful eating habits, and regular activity.”

The Workshop provided an opportunity to examine what is and what is not working and what more can be done in marketing, product innovations, and other approaches to promote healthy food choices and lifestyles for our children. For example, Nickelodeon announced a new partnership that will feature some of its more popular characters, including SpongeBob

¹² “Overweight and Obesity: Home,” Division of Nutrition and Physical Activity, Centers for Disease Control and Prevention, (April 29, 2005).

Squarepants and Dora the Explorer, on packages of spinach and carrots. Kraft discussed its policy to shift the mix of products that it advertises in media primarily reaching children 6 to 11 to products it identifies as healthier.

I anticipate that very soon we will produce a report regarding the Workshop, which will describe the efforts being taken to address the problem and hopefully provide some recommendations as to more we can do going forward. I made clear at the Workshop, however, that I did not see this as a first step toward an advertising ban. Although in this country there would be significant First Amendment limitations on banning or limiting truthful, non-misleading food advertising, even in Europe – which lacks the equivalent of our First Amendment free speech guarantees – many recognize that self-regulation of food marketing practices can be more effective, flexible, and expeditious than government regulation in changing the food marketing environment to address childhood obesity.

Still, there are many, many skeptics of self-regulation. Next month in Brussels, I will be speaking at a joint European Union-United States conference on diet, physical activity, and health. On the agenda is perhaps one of the most significant challenges facing industry self-regulation: addressing public concerns about food advertising and marketing and the growing incidence of obesity worldwide. This is the time for the industry to embrace self-regulation and move forward to convince your critics that you can address public concerns on a self-regulatory basis. Regardless of the causes of the worldwide obesity problem, all segments of society – including the media – need to take a hard look at what we can do to help encourage sound nutrition and physical activity practices. The fact that I can point to successful programs like the ERA's adds greatly to the credibility of our message that current concerns about food advertising

and marketing should be addressed on a self-regulatory basis.

VII. Conclusion

I thank you on behalf of consumers and I look forward to continuing to work with ERSP and ERA.